No. 02-616

Supreme Court U.S.
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IN THE

Supreme Court of the United States

JORGE L. GARIB BAZAIN,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONER

HOWARD M. SREBNICK
BLACK, SREBNICK
& KORNSPAN, P.A.
201 South Biscayne Boulevard
Suite 1300
Miami, Florida 33131
(305) 371-6421

SCOTT A. SREBNICK
2400 South Dixie Highway
Suite 200
Miami, Florida 33133
(305) 285-9019

JOHN G. ROBERTS, JR.*
CHRISTOPHER T. HANDMAN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

*Counsel of Record

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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1. The Solicitor General is wrong to suggest that the sharp conflict between the decision below and this Court's decision in *Fischer* v. *United States*, 529 U.S. 667 (2000), is really no conflict at all. According to the Solicitor General, no conflict exists because the First Circuit purported to have "expressly applied the standard set forth in *Fischer*." Opp. 10. The question presented by the petition, however, is not whether the Court of Appeals accurately cited *Fischer* and the test that decision established for determining whether an entity "receives" federal "benefits"—of course it did—but whether the rule the First Circuit adopted—that entities *necessarily* become recipients of federal benefits whenever they are paid with funds that can be traced to a federal grant—conflicts with the principles this Court established in *Fischer*.

On that question—which, contrary to the Solicitor General's passing assertion, Opp. 11, is purely legal, not "entirely fact-bound"—the government's response is notable for what it does not say. For one thing, the Solicitor General neglects to quote—much less defend—the operative language of the First Circuit's unprecedented legal rule. The Solicitor General notes that the First Circuit found that "the statutory program under which [ACHS] received federal funds to serve AIDS patients and drug addicts was designed to 'insure care of good quality, in general community care facilities,' " *id.* at 12 (quoting 21 U.S.C. § 1177(f)), but fails to mention that, from this premise, the Court of Appeals adopted a startling legal assumption: that the federal government, in making a grant, "would naturally intend its monies to assist" all entities that ultimately render services in furtherance of the grant program, so that those entities become "recipients" of federal "benefits" whenever they are paid with funds that can be traced to a federal grant. Pet. App. 12a.

In refusing to address the First Circuit's novel rule, the Solicitor General not surprisingly makes no effort to reconcile the Court of Appeals' boundless standard with the narrow definition of "benefits" this Court adopted in *Fischer*. As we emphasized in the petition (pp.13-14), this Court held in *Fischer* that "[t]he noun 'benefit' means 'something that guards, aids, or promotes well-being.' " 529 U.S. at 677-678 (quoting Webster's Third New International Dictionary 204 (1971)). Hospitals participating in Medicare thus receive benefits because the money they get represents more than the market value of their services; it also includes additional "aid" to cover "overhead costs[] and education costs" so that "providers possess the capacity to render, on an ongoing basis, medical care to the program's qualifying patients." *Id.* at 680.

The First Circuit's rule—that an organization receives "federal benefits" whenever it is reimbursed with federal-source funds for services that in some way promote the

federal program's objectives—fundamentally departs from *Fischer* by substituting a blanket assumption about what the federal government *intends* for an analysis into what the federal government actually *provides*. The pertinent question under *Fischer* is not whether the federal government hoped that its grant money would be used to retain subcontractors that would promote the program's goals; that is, after all, presumably the hope of every agency. Rather, the proper focus is on whether the federal government buttressed that aspiration with additional "aid." We made this point in the petition (pp.13-14), and the Solicitor General tellingly makes no effort to identify any additional "aid" that subcontractors such as ACHS must receive under the First Circuit's rule to qualify as recipients of federal "benefits."

Nor does the Solicitor General deny the far-reaching consequences of the First Circuit's new rule. We indicated in the petition (pp.18-19) that the decision below would transform not only remote subcontractors like ACHS into recipients of federal benefits but also those subcontractors' vendors (and the vendors' sub-vendors, and so on, *ad infinitum*) whose services necessarily help the subcontractors advance the agency's mission. That the Solicitor General says not a word to the contrary confirms that the First Circuit's rule "would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance." *Fischer*, 529 U.S. at 681.

2. In the petition (pp.14-18), we explained that the First Circuit's decision conflicts with not only *Fischer* but also *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459 (1999), and *United States Department of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 597 (1986), both of which construed analogous federal-funding triggers in statutes enacted—like § 666—pursuant to the Spending Clause. We argued that the First Circuit's rule—that every entity paid with money originating in a federal grant is necessarily a recipient of federal benefits—fundamentally

diverges from this Court's holding in *Paralyzed Veterans* that recipient status under statutes with federal-funding triggers is limited to "those who receive the aid, but does not extend as far as" entities that merely derive some economic advantage from it. *Paralyzed Veterans*, 477 U.S. at 607. We went on to explain that, by extending federal criminal jurisdiction to entities that merely profit from government largesse, the Court of Appeals adopted a rule that "yield[s] almost 'limitless coverage.' " *NCAA*, 525 U.S. at 467 (quoting *Paralyzed Veterans*, 477 U.S. at 608).

Rather than join issue, the Solicitor General mischaracterizes our argument as being nothing more than an objection to extending § 666 jurisdiction to entities "that receive funding indirectly." Opp. 13. That, of course, is not what we said, and the Solicitor General not surprisingly has little difficulty knocking down its straw man. It is well established that an entity can receive federal benefits either directly from the federal government or through an intermediary. *See Fischer*, 529 U.S. at 677; *NCAA*, 527 U.S. 468. That does *not* mean, however, that every entity that indirectly *profits* from a federal government outlay is an indirect *recipient* of federal benefits. As we explained in the petition (p.16), while this Court has "recognized that most federal assistance has 'economic ripple effects,' " it has "rejected the argument that those indirect economic benefits can trigger statutory coverage." *Paralyzed Veterans*, 477 U.S. at 607 (quoting *Grove City College* v. *Bell*, 465 U.S. 555, 572 (1984)).

By ignoring the argument actually presented in the petition, the government offers no explanation for why the federal-funding trigger in § 666—a criminal statute, after all—should be significantly *broader* than the analogous civil antidiscrimination statutes at issue in *NCAA* and *Paralyzed Veterans*. As we demonstrated in the petition (pp.17-18), since both statutory regimes were enacted pursuant to the Spending Clause and because Congress employed nearly identical language in the two, there is no reason the jurisdic-

tional reach of one (the criminal provision) should dramatically extend beyond the other (the civil). The First Circuit's rule fosters precisely that asymmetry and the Solicitor General does not suggest otherwise.

3. The Solicitor General also sidesteps the glaring conflict we identified in the petition (pp.19-21) between the First Circuit's decision and those of its sister circuits holding that § 666 does not extend to entities that enter into commercial transactions with the government. Opp. 14. The Solicitor General maintains there is no conflict because the Court of Appeals concluded that the two lump-sum payments ACHS received were not "mere commercial transactions," but were instead "benefits" because they "were intended to serve the government's interest in quality patient care." *Id.* This explanation underscores precisely why the First Circuit's rule is fatally flawed. If "recipient" status turns on nothing more than whether the government hoped that its money would be paid to entities down the line that would "serve the government's interest"—without requiring any independent showing that the federal government gave the entity some additional "aid," as *Fischer* requires—then even "mere commercial transactions" will become fair game under § 666. That, however, reduces the jurisdictional inquiry under § 666 to a "level of generality" this Court expressly rejected in *Fischer*, 529 U.S. at 681, and dramatically expands federal criminal jurisdiction under the Spending Clause.

4. The Solicitor General does not deny the entrenched circuit split we identified in the petition (pp.21-24) over the question whether, in a § 666 prosecution, the Spending Clause requires proof of some nexus between the allegedly corrupt transaction and the federal interest underlying the expenditure of funds. That tacit concession is wise, since the Solicitor General has elsewhere acknowledged that "[t]here is currently a divergence of views among the circuits on whether Section 666 requires the government to prove a connection between the defendant's criminal acts and some

federal programmatic interest." U.S. Br. in Opp'n, *Suarez* v. *United States*, No. 01-7509, at 9 (2002). This candid survey of the courts of appeals perhaps also explains why the Solicitor General does not dispute the importance of the question presented or the frequency with which it arises in the federal courts. *See* Pet. 25-26.

The Solicitor General nevertheless maintains that the argument was not pressed below and that we are therefore precluded from raising it here. The Solicitor General is wrong. Quoting from the leading case adopting a federal-nexus requirement, we argued below that " '[t]o pass muster under the Spending Clause, legislation regulating behavior of entities receiving federal funds must, among other things, be based upon a federal interest in the particular conduct.' " Br. of Jorge Garib Bazain, *United States* v. *Garib Bazain*, No. 00-2030 (1st Cir.) at 45 (quoting *United States* v. *Zwick*, 199 F.3d 672, 687 (3d Cir. 1999)). But in any event, the Solicitor General's objection confuses *arguments* with *claims*. This Court has consistently held that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992). *See Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *Bankers Life & Cas. Co.* v. *Crenshaw*, 486 U.S. 71, 78 n.2 (1988); *Illinois* v. *Gates*, 462 U.S. 213, 219-220 (1983); *Dewey* v. *City of Des Moines*, 173 U.S. 193, 197-198 (1899). The argument that the First Circuit's rule improperly converts countless cases of localized theft and bribery into federal criminal prosecutions based on the slightest—if any—showing of an actual federal interest is "not a new claim within the meaning of [the] rule, but * * * support[s] what has been [our] consistent claim": that the First Circuit's expansive view of § 666 exceeds the limits of the Spending Clause. *Lebron*, 513 U.S. at 379.

On the merits of this question, the Solicitor General suggests there is an ample federal interest here because "petitioners 'raised the risk' that the target of their misconduct

would 'lack the resources requisite to provide the level and quality of care envisioned by the program.' " Opp. 15 (quoting *Fischer*, 529 U.S. at 681-682) (brackets omitted). But again this explanation proves too much, for if there is a federal interest in deterring Dr. Garib from placing his housekeeper on the ACHS payroll, then there surely is a federal interest in policing the affairs of every entity paid with federal-source funds to provide a service that in some way contributes to "the level and quality of care envisioned by the program"—from the syringe manufacturers to the companies that publish the health-care brochures distributed to clinic patients. Yet to say that this constitutes an adequate federal nexus is effectively to do away with any federal nexus requirement. This Court should grant certiorari to resolve this intractable circuit split.

5. The Solicitor General finally resorts to the last refuge of the government in a criminal case by suggesting that any error the First Circuit committed was harmless. Opp. 12-13. Not so. The Solicitor General emphasizes that, despite disagreements over whether the money ACHS received before 1991 constituted federal benefits under § 666, all parties recognized that ACHS did, in fact, begin receiving federal benefits in early 1991 when it reincorporated as a non-profit entity. But, as the Solicitor General concedes, "[t]he jury was not instructed to base its verdict on petitioners' post-1991 conduct alone." Opp. 12.

Invoking *Neder* v. *United States*, 527 U.S. 1 (1999), the Solicitor General nevertheless invites this Court to look past the jury's verdict and decide for itself that "the jury verdict would have been the same absent the alleged instructional error." Opp. 12. But *Neder*'s harmless error standard is wholly inapplicable here. That is because, under *Neder*, an instructional error is deemed "harmless" only "where a reviewing court concludes beyond a reasonable doubt that the omitted element was *uncontested* and supported by *overwhelming* evidence." *Neder*, 527 U.S. at 17 (emphases

added). Here, although the government conclusorily asserts that "any rational jury that found that petitioners were members of the charged conspiracy in 1989 would necessarily have found that they remained members through 1994," Opp. 12-13, Dr. Garib proffered substantial evidence demonstrating that he had withdrawn from any alleged conspiracy by 1990. On the same day that ACHS reincorporated as a non-profit entity, Dr. Garib—whose salary stood to be halved as a result of the change in status—resigned from the board of directors and ceased any involvement with the administration of ACHS. Dr. Garib thus "contested the omitted element and raised evidence sufficient to support a contrary finding." *Neder*, 527 U.S. at 19. That alone disposes of the government's harmless-error argument.

6. In opposing the second question presented by the petition—whether systematically excluding non-English speakers from juries in Puerto Rico violates the Sixth Amendment's fair cross-section guarantee—the Solicitor General contends that "the presence of non-juror[] [interpreters] in the jury room during deliberations" would undermine the traditional secrecy of jury deliberations and possibly "create[] a serious risk that the course of deliberations will be influenced in ways that would be impossible to detect." Opp. 9. Federal and state practice, however, belies the government's concerns.

In *United States* v. *Dempsey*, 830 F.2d 1084, 1090-91 (10th Cir. 1987), the Tenth Circuit allowed a sign-language interpreter to assist a deaf juror during trial and deliberations, and in doing so rejected the same concerns the government advances here. It found any objection to the loss of secrecy unfounded because "an interpreter may be even less likely than a juror to reveal the confidences of the jury room." *Id.* at 1090. Similarly, the court disagreed that the presence of an interpreter would "inhibit discussion" or otherwise create an "inhibiting influence" on the jury. *Id.* at 1091.

Further undermining the government's objections, a number of States have enacted legislation expressly providing that "[i]f any juror is deaf or hearing impaired, such juror shall have the assistance of a qualified interpreter who shall be present throughout the proceeding and when the jury assembles for deliberation." Conn. Gen. Stat. Ann. § 51-245(d). *See, e.g.*, Ill. Rev. Stat. ch.110, § 8-1402; La. Code Crim. Proc. Ann. art. 401.1(B). These legislative and judicial determinations at both the state and federal level demonstrate that the government's fears are vastly overstated. In any event, as the Tenth Circuit in *Dempsey* concluded, "an important social policy argues against automatically foreclosing members of an important segment of our society from jury duty simply because they must take an interpreter into the jury room." 830 F.2d at 1091.

The Solicitor General's only other argument is that, given the great linguistic diversity in "[m]any cities in this country," adopting "petitioners' theory that an English proficiency requirement violates the fair cross-section requirement" would mean that "some chosen juries would likely require multiple translators." Opp. 9. That, the government maintains, would likewise intrude on the "secret, deliberative process historically associated with a petit jury." *Id.* at 10.

Again, the Solicitor General's concerns are greatly exaggerated. The jury-exclusion question presented by the petition is limited to Puerto Rico, which is the *only* majority-Spanish-speaking federal district in the United States. Indeed, an overwhelming 98% of Puerto Ricans speak Spanish. It is also the only Commonwealth or State that conducts its own judicial proceedings in Spanish. Thus a rule specifically tailored to Puerto Rico's unique history and linguistic demographics will hold at bay the parade of horribles conjured up by the Solicitor General.

* * * *

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HOWARD M. SREBNICK
BLACK, SREBNICK
& KORNSPAN, P.A.
201 South Biscayne Boulevard
Suite 1300
Miami, Florida 33131
(305) 371-6421

SCOTT A. SREBNICK
2400 South Dixie Highway
Suite 200
Miami, Florida 33133
(305) 285-9019

JOHN G. ROBERTS, JR.*
CHRISTOPHER T. HANDMAN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

*Counsel of Record

Counsel for Petitioner